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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1887.

No. 1384.

THE UNITED STATES, APPELLANT,

vs.

JOSEPH C. IRWIN AND JAMES T. THORNTON, SURVIVORS OF THE FIRM OF J. C. IRWIN & CO.

APPEAL FROM THE COURT OF CLAIMS.

FILED MARCH 9, 1888.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1887.

No. 1384.

THE UNITED STATES, APPELLANT,

vs.

JOSEPH C. IRWIN AND JAMES T. THORNTON, SURVIVORS OF THE FIRM OF J. C. IRWIN & CO.

APPEAL FROM THE COURT OF CLAIMS.

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1 In the Court of Claims—Filed September 30, 1886.—J. R.

JOSEPH C. IRWIN AND JAMES T. THORNTON, survivors of the firm of J. C. Irwin & Co.. *vs.* THE UNITED STATES. } No. 15215.

I.—*Petition.*

To the honorable the judges of the Court of Claims:

The petition of Joseph C. Irwin and James T. Thornton shows as follows, to wit:

1. The firm of Joseph C. Irwin & Co. was for many years engaged in freighting across the plains, and was composed of your petitioner and Ulysses Turner, who departed this life about the 20th day of May, A. D. 1879, whereby said firm was dissolved.

2. That in the month of June, 1857, said firm made a contract with Livingston, Kincaid & Co., merchants in New York City, who were also carrying on business in Salt Lake City, and one of whose partners was sutler to a regiment of the Army, to transport from Atchison, Kansas, to Salt Lake City, one hundred tons, or seventy-five wagon loads, of merchandize, at the rate of twenty-five dollars per one hundred pounds; that a portion of said contract, to wit, twenty-five wagon loads, was sub-let by J. C. Irwin & Co.; that all of said trains were loaded and started in good condition and well equipped, and were making eighteen to
2 twenty miles per diem, and reached Rocky Ridge about the 4th or 5th day of October, A. D. 1857.

3. The equipments of J. C. Irwin & Co., and owned by them, consisted of fifty-one wagons, one whereof was loaded with provisions and the fifty with the merchandize; each wagon had twelve head of oxen with chains, yokes, and all necessary fixtures in good order, and each wagon had two new Orsenburg sheets, some of them having a third one, having goods specially liable to damage from water, and the freighters being liable for all such damages. J. C. Irwin, the senior member of the firm, was personally in charge of the trains, having a wagon-master and four assistants, with a full complement of drivers.

4. At Rocky Ridge said Irwin met Capt. Wm. F. Magrath, of the United States Wagon Road Expedition, under charge of Gen. Lander, who was encamped fifty miles to the north on the waters of Wind River Mountain. Desiring to see Gen. Lander and to leave with him a few jaded animals, and let the trains have a few days' rest, they were drawn to the side of the road and grazed for four days whilst Mr. Irwin was gone to Gen. Lander's camp.

5. On the 9th of October said Irwin returned from Lander's camp and found Lieut. Col. C. F. Smith camped near by him with a detachment of the 10th United States Infantry, who directed that no trains should go in advance of him, and ordered said Irwin not to proceed without further orders. Similar orders were given to the other private freighters, merchants' trains.

6. That after about one week had elapsed, Lieut. Col. Smith moved forward with his command and required the merchants' trains to follow in

the rear and move under his orders, and then, marching, they reached a point within two or three miles of South Pass, on the 16th or 17th of October, where Lieut. Col. Smith required them to wait for further orders.

3 7. That learning that Col. Johnson, commanding the expedition, was encamped near by, the said Joseph C. Irwin, on October 19th, addressed a letter to him protesting against military detention, and insisting on the right to withdraw the trains from military control and to proceed with them on the march under his own management. This application being refused by letter of the same day, said Irwin called personally upon Col. Johnson and explained that to move his merchant train of seventy-six wagons in all (including the sub-contractors) would be destructive to his stock, and cause great delay in reaching Salt Lake City, if not prevent his doing so at all; that his contract required delivery within a reasonable time; that until delivery the freight charges could not be collected, and that there was no reason for apprehending violence from the Mormons. But Col. Johnson peremptorily refused, on the ground of military necessity, and issued an order dated October 22d, requiring a list of employés and their occupation, and a daily report to Lieut. Col. Smith of the 10th Infantry.

8. That shortly thereafter the march was resumed under military direction, and an order made fixing the position of each train in the line of march, that of the merchant trains being at the rear end of the column, and their stock being interchangeably used to supplement the teams of the Government trains, they were compelled to stand yoked a great deal longer than they were traveling, and in addition to this had less time for grazing, and being in the rear, the merchant trains got into camp last, and the grass in reach had by then become generally consumed.

That in consequence of this enforced movement with a long column much less progress was made, though waste on the stock was much greater; that the detention and delay incident to the movement of the column threw them into the storms of winter, with bad roads, and the grass

4 covered by snow, and a large amount of the stock perished and those which survived were greatly depreciated.

9. That the column in motion was from ten to fourteen miles long, and petitioner's train was near the end thereof; that the orders required to be ready to move at 9 o'clock, it would frequently be after noon before his teams could start on the road, and it was not unusual that the head of the column would go into camp before the merchant train could start, though in the mean time the cattle had to be yoked up. The deterioration of the stock was very rapid, and as they died off the remaining stock had to draw one set of wagons and go back and draw up another set, and this condition necessarily grew worse and worse, as is illustrated by the fact that so great was the difficulty of making the last thirty miles to Fort Bridger that many of the merchants' wagons were not gotten up until twenty days after the encampment.

That whilst the army was on the march, and just before the impressment of the petitioner's trains, the Mormons had destroyed the trains of the Russells, which were transporting a portion of the Government supplies, and the importance of having the merchants' trains in hand from which to supply the army was imperative, and upon the arrival of the

army at Fort Bridger on November 25th, 1857, petitioner's animals being dead or exhausted, he delivered the freight to Livingston, of the firm of Livingston, Kincaid & Co., receiving his freight pro rata for the distance traveled only, and thereby lost two and 25-100 dollars freight per one hundred pounds on one hundred tons of goods, which, except for this impressment and detention he could easily have earned without detriment to his animals; and the army was supplied with tools and other hardware, shoes, clothing, blankets, medicines, groceries, and other necessaries, to replace the stores burned in Russell's train.

5 10. That whilst the petitioners knew they had nothing to fear from the Mormons, and received assurances to that effect at South Pass through Major Benj. Ficklin, yet they have never questioned the good faith and sound policy of the colonel commanding in assuming military control of these trains, both for the purpose of having the supplies in reach and of keeping them from the Mormons whilst in a threatening attitude.

These petitioners were, however, engaged in lawful business, and were acting lawfully, and although the condition of affairs in Utah were menacing, yet intercourse with the Mormons had not been interdicted, and there was no existing state of hostilities; and if military policy forbade the transfer of merchandize to Salt Lake City the trains might have been permitted to remain at South Pass.

The loss to the firm of J. C. Irwin & Co. consisted of the following items and of the additional expenses made directly and absolutely necessary by the military intervention and interferences, to wit:

186 head of work cattle, lost by death and absolutely abandoned, at $63.00 per head	$11,718.00
Depreciation on 279 head of same, at $13.00 per head, same being sold at $50.00	3,627.00
3 mules, absolutely lost, at $150.00	450.00
1 mule " " $250.00	250.00
Hire of 55 hands, for 2½ months of delay, at $50.00 per month	6,875.00
Cost of provisioning same	2,887.50
Wages of wagon-master, hired at $200.00 per month, round trip	600.00
Wages of 4 assistant wagon-masters, hired at $50.00 per month, round trip	600.00
51 wagons, with covers, yokes, bows, and chains, complete, to wit, 30 at $180.00	5,400.00
21 at $195.00	4,095.00
Detention and want of use of amount of freight bill of $36,000 for 6 months, at 10 per cent	1,800.00
3 horses lost on way back to Missouri, at $106	318.00
Total	$39,460.50

6 Which sum represents only the direct and immediate loss, and does not include any compensation for the personal services of the petitioner, J. C. Irwin, nor for the consequential loss of freight between Fort Bridger and Salt Lake City.

11. That in the 36th Congress, to wit, on June 22d, 1860, a bill passed the House of Representatives, upon a favorable report of Mr. Stanton's, from the Committee on Military Affairs, referring this claim, and those of the other merchant freighters, to this court for adjudication, with the right of appeal to the Supreme Court, and was reported to the Senate, but on the last day of the session, to wit, June 25th, 1860, it was put upon its passage in the Senate, but on motion made it was referred to the Committee

on the Judiciary, and thus lost. The agitation over the Presidential election, the secession movements, and the war between the States, engrossed the attention and legislation of the country, and during the war period, and for some time thereafter, your petitioners were engaged and personally occupied in contracts with the Government for transporting supplies to Fort Leavenworth and points west, which prevented active attention to this claim, though bills were introduced in the 47th and 48th Congresses, some favorable reports made thereon, with the usual fate of Congressional legislation.

12. That in the first session of the Forty-ninth Congress an act was passed and approved July 8th, 1886, referring this claim "with all papers relating thereto" to the Court of Claims for adjudication, according to law, on the proofs heretofore presented, and such other proofs as may be adduced, and report the same to Congress.

13. That no assignment or transfer of this claim, or any part thereof, or interest therein, has been made; that claimants are justly entitled
7 to the amount herein claimed from the United States, after allowing all just credits and offsets, and he believes the facts stated in this petition to be true.

Wherefore your petitioners pray that you will investigate this case in pursuance of the act of Congress referred to, and that you will adjudicate that the amount due to your petitioners is the sum of thirty-nine thousand four hundred and sixty dollars and fifty cents.

JOSEPH C. IRWIN,
Petitioner.

EARLE & PUGH,
Pl'ffs' Att'ys.
J. W. DENVER,
Of Counsel.

STATE OF MISSOURI, }
Kansas City. }

Before me personally appeared Joseph C. Irwin, the above-named petitioner, and made oath that the matters averred on his own personal knowledge in the foregoing petition are true, and those stated upon information and belief he believes to be true.

[SEAL.]

D. H. CECIL,
Notary Public.

Commission expires Oct. 16, 1888.

[PUBLIC—No. 121.]

AN ACT referring to the Court of Claims the claims for property seized by General Johnston on the Utah expedition for examination and report.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the claims of Joseph C. Irwin and Company and C. A. Perry and Company, freighters, for property claimed to have been taken and impressed into the service of the United States in the year eighteen hundred and fifty-seven, by orders
8 of Colonel Albert Sidney Johnston, in command of the Utah expedition, as well as for property alleged to have been sold to the

Government, be, and the same are hereby, referred, with all the papers relating thereto, to the Court of Claims for adjudication, according to law, on the proofs heretofore presented, and such other proofs as may be adduced, and report the same to Congress.

Approved July 8, 1886.

DEPARTMENT OF STATE, *July* 23, 1886.

A true copy.

SEVELLON A. BROWN,
Chief Clerk.

9 II.—*General traverse filed.*

And now comes the Attorney-General, on behalf of the United States, and answering the petition of the claimant herein, denies each and every allegation therein contained; and asks judgment that the petition be dismissed.

And as to so much of the said petition as avers that the said claimants have at all times borne true faith and allegiance to the Government of the United States, and have not in any way voluntarily aided, abetted, or given encouragement to rebellion against the said Government, the Attorney-General, in pursuance of the statute in such case provided, denies the said allegations, and asks judgment accordingly.

ROBERT A. HOWARD,
Assistant Attorney-General.

10 III.—*Findings of fact and conclusion of law.—Filed Feb'y* 27, 1888.

FINDINGS OF FACT.

This case having been heard by the Court of Claims, the court, upon the evidence, find the facts to be as follows:

I.

The firm of J. C. Irwin & Co., at the time of the occurrences hereinafter set forth, was composed of Joseph C. Irwin, James T. Thornton, and Ulysses Turner. Ulysses Turner died May 20, 1879. The said firm was for many years engaged in freighting across the plains.

II.

In June, 1857, this firm made a contract with Livingston, Kincaid & Co., merchants in Salt Lake City, to transport from Atchison, Kansas, to Salt Lake City, 75 wagon loads of merchandise.

III.

Thereafter, and late in the summer of 1857, plaintiffs started their trains from Atchison, Kansas, on the way to Salt Lake City, Utah.

IV.

Progressing successfully upon their journey, the trains reached Rocky Ridge early in October. The animals were in good condition, and the trains were making from 18 to 20 miles per day. At this point they were met by United States troops, under command of Lieutenant-Colonel Smith, who ordered the trains to proceed no further without his permission.

V.

Lieutenant-Colonel Smith was under command of Colonel Albert Sidney Johnston. The latter joining the former's command a few days after the order recited in Finding IV, issued the following order:

HEADQUARTERS ARMY OF UTAH,
South Pass, October 19, 1857.

SIR: The colonel commanding directs me to inform you, in reply to your letter of to-day, that no goods or supplies of any kind will be permitted to pass this army for Salt Lake City, or other points occupied by the Mormons, so long as they maintain a hostile attitude to the Government of the United States.

I am, sir, very respectfully, your obedient servant,

F. J. PORTER,
Assistant Adjutant-General.

To J. C. IRWIN, Esq.

11 VI.

October 24, the following order intended to carry out the order of October 19 (set forth in Finding V) was promulgated:

(1) The following will be the position of the trains during the march from this point (Rocky Ridge):

1. Headquarters of the army.
2. Infantry battalion.
3. Volunteers.
4. Squadron of dragoons.
5. Supply train in charge of Mr. Rice.
6. Supply train in charge of Mr. Goodwin.
7. Supply train in charge of Mr. Harper.
8. Supply train in charge of Mr. Shepherd.
9. Sutlers, Fifth Infantry.
10. Sutlers, Tenth Infantry.
11. Sutlers, Second Dragoons.
12. Gilbert and Gerrish.

(2) On arriving in camp each train will be parked in the usual manner; the ox trains about 60 yards from each other—they forming the three or four sides of a rectangle—as may be convenient.

(3) The following will be the disposition of the troops during the march:

The infantry guards in the rear of its train.

The volunteers in the rear of its train.

The dragoons in the rear of its train.

Company D, Tenth Infantry, opposite supply train No. 2.
Volunteers opposite supply train No. 4.
Company A, Tenth Infantry, opposite sutlers.
Tenth Infantry.

A non-commissioned officer and six privates will accompany each detachment of infantry.

A like detail will serve as an escort to the commanding officer.

The remainder of the mounted force will march in front and in the rear of the whole train, the companies alternating.

Companies A and D, Tenth Infantry, will also alternate in position.

(4) In case of attack the teamsters are expected to stand to their wagons and use their fire-arms from them.

The commanders of detachments will act as the circumstances seem to call for, sending instant information to the commanding officer, who will be habitually in front, as well as to the other commanders of detachments.

By order of Brevet Colonel Smith:

J. McNAB,
First Lieutenant Tenth Infantry, Acting Adjutant.

Plaintiffs did not seek or desire military protection, and requested Colonel Johnston to be allowed to proceed on their journey, as they were not, in their opinion, in danger from the Mormons; this request was denied.

VII.

Plaintiffs were required by the commander to have their teams yoked and ready by ten in the morning, and they often had to stand for two hours in consequence of delay in the general movement. The teams always got into camp late, and consequently were grazed at great disadvantage. They also were limited to a defined and contracted space assigned them, and were not permitted by the military authorities to go beyond this space. The animals belonging to the Army arrived first at camp and were posted on the best grass. As a necessary result freighters' teams were insufficiently fed.

12

VIII.

Plaintiffs' animals were often used to aid in hauling the Government trains, and thus did extra work on insufficient food. The orders requiring plaintiffs' trains to move with the Army column necessarily impeded their progress and held them back until the bad weather set in.

IX.

For the reasons set forth in the preceding findings, plaintiffs' stock became greatly reduced in flesh and many died from overwork and starvation.

X.

Plaintiffs' trains were loaded with goods and merchandise notoriously intended for trade with the Mormon inhabitants of the Territory of Utah, who were then in avowed rebellion and in threatened war with the Government of the United States, but plaintiffs were ignorant of this state of affairs upon starting and until arrival at Rocky Ridge.

XI.

R. H. and James Porter were also freighters like plaintiffs. They also were detained at the same time, under substantially the same circumstances as those hereinbefore set forth; an act for their relief is found in volume 24 of the Statutes at Large, at page 900.

XII.

By reason of the circumstances hereinbefore set forth, plaintiffs directly suffered loss in the sum of $21,600.

CONCLUSION OF LAW.

Upon the foregoing facts the court finds as conclusion of law that the plaintiffs recover the sum of $21,600.

13 IV.—*Final judgment.*

At a Court of Claims held in the city of Washington, D. C., on the 27th day of February, A. D. 1888, judgment was ordered to be entered as follows:

The court on due consideration of the premises find for the claimants, and do order, adjudge, and decree that the said Joseph C. Irwin and James T. Thornton, as survivors of the said firm of J. C. Irwin & Co., do have and recover of and from the United States the sum of twenty-one thousand six hundred dollars ($21,600.00).

14 V.—*Application of defendants for, and allowance of, appeal.*

From the judgment rendered in the above-entitled cause on the 27th day of February, 1888, in favor of claimants, the defendants, by their Attorney-General, on the 6th day of March, 1888, make application for, and give notice of, an appeal to the Supreme Court of the United States.

ROBERT A. HOWARD,
Assistant Attorney-General.

Filed March 6, 1888.
Allowed in open court.

WILLIAM A. RICHARDSON,
Chief Justice.

15 VI.

In the Court of Claims.

JOSEPH C. IRWIN AND JAMES T. THORNTON, survivors of the firm of J. C. Irwin and Company,
vs.
THE UNITED STATES. } No. 15215.

I, John Randolph, assistant clerk of the Court of Claims, do hereby certify that the foregoing are true transcripts of the pleadings in the

above-entitled cause, of the findings of fact by the court, and the conclusion of law thereon; of the final judgment of the court, of the application of defendants for, and allowance of, appeal to the Supreme Court of the United States.

In testimony whereof I have hereunto set my hand and affixed the seal of said court at Washington, this eighth day of March, A. D. 1888.

[SEAL.] JOHN RANDOLPH,
Ass't Clerk Court of Claims.

(Indorsement on cover:) No. 1384. The United States, appellant, vs. Joseph C. Irwin and James T. Thornton, survivors of the firm of J. C. Irwin & Company. Court of Claims. Filed March 9, 1888.

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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1887.

No. 1385.

THE UNITED STATES, APPELLANT,

vs.

CHARLES A. PERRY, ELIAS H. PERRY, AND JOHN D. HARPER, OF THE FIRM OF CHARLES A. PERRY & CO.

APPEAL FROM THE COURT OF CLAIMS.

FILED MARCH 9, 1888.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1887.

No. 1385.

THE UNITED STATES, APPELLANT,

vs.

CHARLES A. PERRY, ELIAS H. PERRY, AND JOHN D. HARPER, OF THE FIRM OF CHARLES A. PERRY & CO.

APPEAL FROM THE COURT OF CLAIMS.

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1 Court of Claims of the United States. December term, 1886.

CHARLES A. PERRY, ELIAS H. PERRY, AND JOHN D. HARPER, of the firm of Charles A. Perry & Co.,
vs.
THE UNITED STATES.
No. 15313.

I.—*Petition—Filed October* 12, 1886.—*J. R.*

To the honorable the Court of Claims:

The petition of Charles A. Perry & Co. respectfully shows:

1. That in August, 1857, Charles A. Perry, Elias H. Perry, and John D. Harper were partners, doing a general merchandise business as such, at Salt Lake City, Utah Territory, under the firm name of Charles A. Perry & Co.

2. That on or about of the 13th day of August, 1857, said firm started three ox trains—two of twenty wagons each and one of eighteen wagons; also five wagons drawn by mules—from Fort Leavenworth, Kansas, to Salt Lake City, Utah Territory. There were in this train, belonging to said firm, seven hundred and fifty head of cattle, thirty-seven head of mules, seven head of horses, and sixty-three wagons, accompanied
2 by Ellias H. Perry, one of said firm, and a sufficient number of wagon masters, teamsters, and employés, all well equipped and suited for service and travel.

3. That J. C. Irwin & Co., merchant freighters, with their trains, and petitioners, with theirs, were making the journey across the plains together, bound for the same destination. The said J. C. Irwin was in charge of his own train and was the spokesman and general director of their combined trains.

4. That said trains, without any material loss, proceeded upon their journey at the rate of eighteen to twenty miles each day until they reached Rocky Ridge, about the 4th or 5th of October. Here the said J. C. Irwin met W. F. McGraw and James Saunders, of the United States Wagon-Road Expedition. The said Irwin being well acquainted with Saunders and McGraw and with General Lander, whom he was informed by them was encamped about fifty miles distant, upon the invitation of the said McGraw, and for the purposes of recruiting and rest, decided to go over to General Lander's camp. The said Irwin accordingly had the entire train drawn off the road until he and McGraw returned from a visit to General Lander's camp, which he did in about four days—the 9th of October. Upon Irwin's return to his train he found Colonel Smith, of the 10th Infant'y, sent out to stop the supply trains and to prevent the Mormons from capturing them. Colonel Smith directed the said J. C. Irwin, for himself and the merchant trains with him, not to proceed until further orders. About a week later Irwin and petitioner's train moved under orders of Colonel Smith, marching in the rear of his detachment until about the 17th of October, when a point two or three miles east of South Pass was reached.

5. That at the last-named place the said J. C. Irwin, learning that Colonel Johnston was in command of the expedition, advised Col.
3 Johnston that he had no fears from the Mormons, and protested in his own behalf, and in behalf of petitioners, against the military

detention, and insisted on the right to withdraw the trains from military control. Colonel Johnston refused all requests to withdraw, saying that the presence of petitioners' train in the Army was a "military necessity," and replied as follows to a communication of the said J. C. Irwin of October the 19th, 1857, upon the subject of the withdrawal of the merchant trains:

"HEADQUARTERS ARMY OF UTAH,
"SOUTH PASS, EN ROUTE TO SALT LAKE CITY,
"*Oct. 19th*, 1857.

"SIR: The colonel commanding directs me to inform you, in reply to your letter of to-day, that no goods or supplies of any kind will be permitted to pass the army for Salt Lake City or other points in possession of the Mormons, nor any communication whatever to be had with them, so long as they manifest a hostile attitude to the Government of the United States.

"(Signed) F. J. PORTER,
"*Ass't Adj't Gen'l.*

"To J. C. IRWIN, Esq."

That in pursuance to the above the following order was issued:

"HEADQUARTERS OF THE ARMY OF UTAH,
"SOUTH PASS, EN ROUTE TO SALT LAKE CITY,
"*Oct. 22nd*, 1857.

"I am directed by the colonel commanding to call upon you to furnish Brevet Col. C. F. Smith, 10th Infantry, as soon as practical, the names and the occupation of the men in your employ and in any way or manner accompanying your trains. He also directs that all men be taken in charge and sent under safe escort to Colonel Smith who may visit your camp or be found loitering in the vicinity, if not personally known to belong to any of the trains. All persons, no matter who they are, coming from a distance will be escorted in like manner to that officer. He likewise cautions you against permitting your men to leave camp for any length of time during the day, and requires you to report their presence
4 or absence every morning. He forbids all communications or messengers being in advance of this expedition except by permission of the commanding officer, Colonel Smith—the application to be made in writing.

I am, sir, very respectfully, your obedient servant,
"F. J. PORTER,
"*Ass't Adj't Gen'l.*"

In pursuance to the last-mentioned the following order was issued by Brevet Colonel Smith:

"Official.

"HEADQUARTERS BATT. 10TH INFANTRY,
"CAMP NEAR SOUTH PASS, U. T., *Oct. 24th*, 1857.

"The following will be the position of the trains during the march from this point: (1) Headquarters of the Army; (2) Infantry battalion; (3) Volunteers; (4) Supply train in charge of Mr. Rice; (5) do. do. Mr.

Goodwin; (6) do. do. Mr. Harper; (7) do. do. Mr. Shepperd; (8) Sutlers, 5th Infantry; (9) do. do.; (10) 2nd Dragoons; (11) Gilbert & Garrish. (12) On arriving in camp each train will be parked in the usual manner—the ox trains about 60 yards from each other, they forming the three sides of a rectangle, as may be convenient. (111) The following will be the disposition of the troops during the march: The infantry guard in the rear of its trains; the volunteers do. do.; the dragoons do. do.; Company D, 10th Infantry, opposite sutlers; (10) Infantry. A non-commissioned officer and six privates will accompany each detachment of infantry. A like detail will serve as an escort to the commanding officer. The remainder of the mounted force will march in front of and in rear of the whole train, the companies alternating. Companies A and D, 10th Infantry, will also alternate in position. (IV) In case of an attack the teamsters are expected to stand to their wagons and use their fire-arms from them. The commanders of detachments will act as the circumstances seem to call for, sending instant information to the commanding officers, who will be habitually in front, as well as the other commanders of detachments.

"By order of Brevet Colonel Smith.

"(Signed) J. McNAB,

"*1st Lieut. 10th Infan'y, A. A.*"

5 6. That in accordance with the foregoing orders petitioners' merchant train, consisting of seven hundred and fifty head of cattle, thirty-seven head of mules, seven head of horses, and sixty-three wagons, were impressed into the service of the United States Government.

7. The petitioners' horses, mules, and cattle were used indiscriminately with those of the army; that, owing to the vast number of cattle and mules brought together in a small space and the orders of march assigned the trains, it was impossible for the trains in the rear (this being the position assigned petitioners) of the army to get sufficient forage, which, together with many other hardships, caused the death and loss to petitioners' of many of their mules, cattle, and horses.

8. That the position assigned petitioners' train in the line of march prevented it from getting sufficient forage, for the want of which, from the 19th day of October, 1857, the day of the issue of said order of Colonel Johnston, to the 26th day of November, 1857, when the army arrived at Camp Scott, five hundred and sixty head of cattle, thirty-four head of mules, and five head of horses died in consequence of petitioners' train being required to march and camp with the army. The loss of said mules, horses, and oxen caused the abandonment of thirty-five wagons. In addition to the above, petitioners suffered the loss of their personal services and the services of their wagon-masters, teamsters, employés, and other expenses incident to the delay occasioned by military interference and consequent destruction of property.

9. That an itemized statement shows the losses of petitioners to be as follows:

560 cattle, at $80.00 per head	$44,800.00
34 mules, at $150.00 per head	5,100.00
5 horses, at $150.00 per head	750.00
35 wagons, at $200.00 each	7,000.00
Personal service, teamsters, incidentals, etc	3,000.00
	$60,650.00

6 10. That said loss occurred from the negligence in no respect of petitioners, but from causes arising by what was termed "military necessity" by Colonel Johnston, which induced the latter to issue an order keeping petitioners' train, as a supply train, in reach, and to prevent any possible communication with the Mormons, who were at that time in a threatening attitude towards the United States Government.

11. That a bill passed the House of Representatives in Thirty-sixth Congress referring petitioners' claim to this honorable court, but failed to pass the Senate. In the Forty-ninth Congress the following act was passed referring this claim to this honorable court:

(PUBLIC. No. 121.)

AN ACT referring to the Court of Claims the claims for property seized by General Johnston on the Utah expedition for examination and report.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the claims of Joseph C. Irwin & Co. and C. A. Perry & Co., freighters, for property claimed to have been taken and impressed into the service of the United States in the year eighteen hundred and fifty-seven, by orders of Colonel Albert Sidney Johnston, in command of the Utah expedition, as well as for property alleged to have been sold to the Government, be, and the same are hereby, referred, with all the papers relating thereto, to the Court of Claims for adjudication, according to law, on the proofs heretofore presented and such other proofs as may be adduced, and report the same to Congress.

Approved July 8, 1886.

12. No other action than as aforesaid has been had on this claim in Congress or in any of the Departments.

13. That petitioners are the only owners of this claim and the only persons interested therein, and no assignment or transfer of any part thereof has been made.

7 14. That petitioners are herein justly entitled to the amount herein claimed from the United States, after allowing all just credits and offsets. They are citizens of the United States. They believe the facts as stated in this petition to be true.

15. Wherefore your petitioners pray that your honorable court will investigate the case in pursuance of the act of Congress referred to, and that you will adjudicate that the amount due to your petitioners is the said sum of $60,650.00.

CHARLES A. PERRY.

J. W. DENVER,
Att'y for Petitioner.
J. G. ZACHRY,
EARL & PUGH,
Of Counsel.

Charles A. Perry, being duly sworn, deposes and says: I am the Charles A. Perry named as one of the petitioners in this case. I have read the

above petition, and the matters therein stated are true to the best of my knowledge and belief.

CHARLES A. PERRY.

Subscribed and sworn to before me this 7th day of October, 1886.
[SEAL.] PHIL. ROGERS,
Clk County Court.

8 II.—*General traverse.*—*Filed.*

And now comes the Attorney-General, on behalf of the United States, and answering the petition of the claimant herein, denies each and every allegation therein contained; and asks judgment that the petition be dismissed.

And as to so much of the said petition as avers that the said claimants have at all times borne true faith and allegiance to the Government of the United States, and have not in any way voluntarily aided, abetted, or given encouragement to rebellion against the said Government, the Attorney-General, in pursuance of the statute in such case provided, denies the said allegations, and asks judgment accordingly.

ROBERT A. HOWARD,
Assistant Attorney-General.

9 III.—*Findings of fact and conclusion of law.*

FINDINGS OF FACT.

This case having been heard by the Court of Claims, the court, upon the evidence, find the facts to be as follows:

I.

In August, 1857, Charles A. Perry, Elias H. Perry, and John D. Harper were partners, doing a general merchandise business as such, at Salt Lake City, Utah Territory, under the firm name of Charles A. Perry & Co.

II.

About the 13th August, 1857, this firm started three ox-trains—two of twenty wagons each, and one of eighteen wagons, with five wagons drawn by mules—from Fort Leavenworth, Kansas, to Salt Lake City, Utah Territory.

III.

The trains reached Rocky Ridge early in October, 1857, and were progressing successfully on their journey. The animals were in good condition, and making 18 to 20 miles per day. At this point they were met by United States troops, under command of Lieutenant-Colonel Smith, who ordered the trains to proceed no farther without his permission.

IV.

Lieutenant-Colonel Smith was under command of Col. Albert Sidney Johnston. The latter, joining the former's command a few days after the order recited in Finding III, issued the following order:

HEADQUARTERS ARMY OF UTAH,
South Pass, October 19, 1857.

SIR: The colonel commanding directs me to inform you, in reply to your letter of to-day, that no goods or supplies of any kind will be permitted to pass this army for Salt Lake City, or other points occupied by the Mormons, so long as they maintain a hostile attitude to the Government of the United States.

I am, sir, very respectfully, your obedient servant,

F. J. PORTER,
Assistant Adjutant-General.

10 V.

October 24 the following order, intended to carry out the order of October 19 (set forth in Finding IV), was promulgated:

I. The following will be the position of the trains during the march from this point (Rocky Ridge):

(1) Headquarters of the Army.
(2) Infantry battalion.
(3) Volunteers.
(4) Squadron of dragoons.
(5) Supply train in charge of Mr. Rice.
(6) Supply train in charge of Mr. Goodwin.
(7) Supply train in charge of Mr. Harper.
(8) Supply train in charge of Mr. Shepherd.
(9) Sutlers, Fifth Infantry.
(10) Sutlers, Tenth Infantry.
(11) Sutlers, Second Dragoons.
(12) Gilbert and Gerrish.

II. On arriving in camp each train will be packed in the usual manner; the ox-trains about 60 yards from each other—they forming the three or four sides of a rectangle, as may be convenient.

III. The following will be the disposition of the troops during the march:

The infantry guards in rear of its train.
The volunteers in rear of its train.
The dragoons in rear of its train.
Company D, Tenth Infantry, opposite supply train No. 2.
Volunteers opposite supply train No. 4.
Company A, Tenth Infantry, opposite sutlers.
Tenth Infantry.

A non-commissioned officer and six privates will accompany each detachment of infantry.

A like detail will serve as an escort to the commanding officer.

The remainder of the mounted force will march in front and in the rear of the whole train, the companies alternating.

Companies A and D, Tenth Infantry, will also alternate in position.

IV. In case of attack the teamsters are expected to stand to their wagons and use their fire-arms from them.

The commanders of detachments will act as the circumstances seem to call for, sending instant information to the commanding officer, who will be habitually in front, as well as to the other commanders of detachments.

By order of Brevet Colonel Smith.

J. McNAB,
First Lieutenant Tenth Infantry, Acting Adjutant.

VI.

Plaintiffs were required to have their teams yoked and ready by ten in the morning, and they often had to stand for two hours in consequence of delay in the general movement. The teams always got into camp late, and consequently were grazed at great disadvantage. They also were limited to a defined and contracted space assigned them, and were not permitted by the military authorities to go beyond this space. The animals belonging to the Army arrived first at camp and were posted on the best grass. As a necessary result freighters' teams were insufficiently fed.

VII.

Plaintiffs' animals were often used to aid in hauling the Government trains, and thus did extra work on insufficient food. The orders requiring plaintiffs' trains to move with the Army column necessarily impeded their progress, and held them back until the bad weather set in.

11 VIII.

For the reasons set forth in the preceding findings plaintiffs' stock became greatly reduced in flesh and many died from overwork and starvation.

IX.

Plaintiffs' trains were loaded with goods and merchandise notoriously intended for trade with the Mormon inhabitants of the Territory of Utah, who were then in avowed rebellion and in threatened war with the Government of the United States, but plaintiffs were ignorant of this state of affairs upon starting and until arrival at Rocky Ridge.

X.

R. H. and James Porter were also freighters, like plaintiffs'; they also were detained at the same time under substantially the same circumstances as those hereinbefore set forth. An act for their relief is found in volume 24 of the Statutes at Large, at page 900.

XI.

By reason of the events hereinbefore set forth plaintiffs directly suffered loss in the sum of $44,025.

CONCLUSION OF LAW.

Upon the foregoing facts the court find as conclusion of law (following the opinion in the case of J. C. Irwin & Co.), that the plaintiffs recover the sum of $44,025.

IV.—*Opinion.*

DAVIS, J., delivered the opinion of the court:*

This is a claim for loss sustained by a freighter across the plains through the alleged impressment of his trains by order of Colonel Albert Sidney Johnston, during the Utah expedition of 1857.

The case comes to us by virtue of the provisions of the following act of Congress, approved July 8, 1886:

"That the claims of Joseph C. Irwin & Co., and C. A. Perry & Co., freighters, for property claimed to have been taken and impressed into the service of the United States in the year 1857, by orders of Col. Albert Sidney Johnston, in command of the Utah expedition, as well as for property alleged to have been sold to the Government, be, and the same are hereby referred, with all the papers relating thereto, to the Court of Claims for adjudication according to law, on the proofs heretofore presented and such other proofs as may be adduced, and report the same to Congress."

Our first duty is to ascertain the nature and extent of the jurisdiction conferred upon this court by the act. The controlling word is "adjudication;" the claims are referred here for "adjudication," and for adjudication "according to law." If this were all there would be no difficulty in the solution of the intent of the statute and we should immediately consider ourselves authorized to proceed to judgment, from which an appeal would in due course lie to the Supreme Court.

The question, however, is complicated by the addition at the end
12 of the statute of the words "and report the same to Congress."

These words, it is urged, destroy the power to enter final judgment and place the court in a position analogous to that occupied by them in cases referred under the statute of 1883 ( ), wherein we act simply in aid of the Congress, and have not judicial power. If this contention be correct, the force and effect of the word "adjudicate" is destroyed. That word is evidently carefully selected, and must be assumed to have been chosen by the law-makers with deliberate intent that we should give to it the full legal effect to which it is entitled. That legal effect is to hear these claims upon the evidence, to enter judgment thereupon from which an appeal will lie, and not simply to prepare for the advice of Congress and in aid of that body a report which carries with it no definite legal result.

To adjudicate is to give judgment; an adjudication is a settlement by judgment; and a judgment in its nature is a conclusion of litigation. A hearing and report to the Congress in a manner substantially advisory only is in no judicial sense a finality, but is a mere transfer back to the legislature of the power to settle.

Every judgment of this court is reported to the Congress (sec. 1057, Rev. Stat.); this report is not understood to be in its nature advisory, but

*The opinion was delivered in the case of J. C. Irwin & Co.

to be a method prescribed to us by the Congress of informing that body of the debts found due in course of law by the United States to individuals, in order that provision may be made for their payment.

In practice, the judgments of this court are regarded as finalities, they have never been repudiated as "adjudications according to law," and the Congress, of course, had this in view when the statute under discussion was passed; the language appearing in it must be read with this understanding.

We attach to the words "report to Congress" only this effect, that the judgment is in due course to be reported to Congress, as are other judgments, and that this case is to receive, through the special act, no different or greater or less advantages, if such there be, than those which pertain to other successful litigants within this jurisdiction.

"Report the same to Congress," in our opinion, means no more than that we are to report the result of the "adjudication according to law" directed by the Congress to be made. We are not to certify our opinion to the Congress, nor are we to report it to any other officer or Department of the Government, and the case, having once been "adjudicated" here, will be (subject of course to revision by the Supreme Court) as finally settled as is any other case falling within our jurisdiction, all of which are reported to Congress.

In Gordon's Case (117 U. S. R., p. 697) the objection taken by the learned Chief-Justice to the finality of the decision was based upon clauses of the statute of 1863, which required all judgments rendered by this court to be presented to the Secretary of the Treasury, and provided that they should not be paid until "after an appropriation therefor shall be estimated for by the Secretary of the Treasury." Under this state of the law, said the Chief-Justice, "The real and ultimate judicial power will be exercised by the legislative department, and not by that department to which the Constitution has confided it." (p. 703.) That is, the judgment depended for its enforcement first upon an estimate by the Secretary of the Treasury; second, upon an appropriation by the Congress, and therefore was not final.

13 This feature of the act of 1863 was repealed in 1866, and soon after the case of de Groot was carried to the Supreme Court. (5 Wall., 419.)

That case came to the Court of Claims under a special act, directing the Secretary of War to transmit all papers relating to the case "to the Court of Claims for adjudication," and the Supreme Court entertained an appeal under this phraseology of the special act. That is, the court necessarily held that "adjudication" involved entry of judgment.

Atocha's claim (17 Wall., 439) grew out of treaty stipulations, and was, therefore, not within the general jurisdiction of this court. A special act sent it here, and after decision an application to the Supreme Court for a mandamus was refused, upon the ground that the authority of this court to hear and determine the claim, and the authority of the Supreme Court to review the action below, were limited and controlled by the special act, and as that act directed the Court of Claims to make a "specific examination into the justice of the claim against Mexico," and whether "it was embraced within the treaty," and if of opinion that it was just and embraced within the treaty, then "to fix and determine its amount," such determination

was final. The Supreme Court, however, noted the distinction between the phraseology of the Atocha act and that for the benefit of Meade (14 Stat. L., 611), which referred a claim to this court "for adjudication thereof pursuant to authority conferred upon said court by any existing law to examine and decide claims against the United States referred to it by Congress," phraseology which seems to us equivalent in legal effect to that used in the special act now under consideration, to wit: "For adjudication according to law."

The Congress, thoroughly familiar with these rulings of the Supreme Court, used the language of the special act advisedly and carefully, and we conclude that they intended us to enter judgment in this case, and to report that fact to the Congress, as we do in other cases.

Having decided that we are to "adjudicate;" that is, to find a judgment, "according to law," we must turn again to the act for the purpose of discovering the precise question submitted to us. It is the claims of certain individuals for property alleged to have been "taken and impressed into the service of the United States" at a time fixed, under an order specified, "as well as for property alleged to have sold to the Government." The last clause is simple of construction and clearly refers to the same transaction. In fact, there is no contention to the contrary. We are then presented with this question: Was plaintiff's property "taken and impressed into the service of the United States?"

It appears from the findings that while proceeding across the plains with trains laden with merchandise, carried under a contract of affreightment, and destined for delivery to individuals in Salt Lake City, plaintiffs were halted within something over 200 miles of their destination by order of an officer commanding United States troops. The Mormons were then in a hostile attitude against the United States, and these troops were engaged in the duty of enforcing the peace. Plaintiffs were detained with the column, and, as a necessary result, not only did they not reach Salt Lake City at all, but they lost a large amount of property, mostly beasts of burden, which died from fatigue, exposure, and insufficient food. The column finally, after much hardship, arrived at Fort Bridger, and did not proceed farther that winter, and there much of plaintiffs' property was taken for the use of the Army. As to this last item there can be
14 little dispute; the real contention turns upon the death of oxen and horses and other losses incident to the detention by military command.

"Impressment" has been defined as a taking into the public service by compulsion (10 Op. Atty. Gen'l, p. 24), and "service" as the voluntary or involuntary subjection of one's conduct to the control of another for the benefit of another (Ibid).

The primary object of Colonel Johnston's order was not for the protection of plaintiffs; they did not ask it; on the contrary, they requested permission to proceed. Whatever their feelings may have been, as patriotic citizens, in the strife then progressing, as freighters they could have no object in delaying a delivery into Mormon hands of goods which the Mormons would be glad to receive, and which the freighters were under contract to carry with reasonable expedition to their destination in Salt Lake City. On the other hand, it was the duty of the military commander to prevent any increase of the enemy's supplies, and for this purpose he very

properly detained all trains bound westward. In the performance of his military duty the commander stopped these trains, forced them into his column, placed them under military discipline, ordered them as to their participation in defense against a possible attack, and finally made direct use for the benefit of the Army of the freighters' property.

It is a question whether the loss of beasts of burden due to the delay was a destruction of private property caused by military operations (United States vs. Pacific R. R., 120 U. S., 227), or a loss arising from the necessary taking into public service of private property upon compulsion.

The commander directed that no goods or supplies should pass the Army for points occupied by the Mormons, and that no communication whatever should be held with them so long as they maintained a hostile attitude. In the then position of affairs this was a reasonable and necessary military order. Colonel Johnston would, it seems to us, have failed in his duty had he allowed supplies to go forward to the enemy he was ordered to quell.

The train was placed under military control; it was delayed; its stock was used to some extent in direct aid of the Government teams. As an immediate result of the military action plaintiff's loss occurred. To be sure, this loss—we are now speaking more particularly of the death and deterioration of stock—was not a benefit to the Government, on the contrary; but the detention which was the direct cause of the loss was a most substantial advantage to it.

Mitchell against Harmony, to which we are cited as an authority against plaintiff's contention, seems hardly in point, for there the court held that there was no emergency which justified the taking. "It is the emergency which gives the right, and the emergency must be shown to exist before the taking can be justified." (13 Howard, p. 134.)

In United States against Russell the doctrine of Mitchell against Harmony was affirmed, the court using this language when speaking of a taking by imperative military necessity:

"Such a taking of private property by the Government when the emergency of the public service in time of war or impending public danger is too urgent to admit of delay, is everywhere regarded as justified, if the necessity for the use of the property is imperative and immediate, and the danger as heretofore described is impending; and it is equally clear
15 that the taking of such property under such circumstances creates an obligation on the part of the Government to reimburse the owner to the full value of the service. Private rights under such extreme and imperious circumstances must give way for the time to the public good, but the Government must make full restitution for the sacrifice. (13 Wall., p. 623.)"

Any doubts which might remain as to the legal effect of Colonel Johnston's order are cleared away by a legislative and an executive construction directly in point. The Porters were freighters like the Irwins; like the latter they were stopped at Rocky Ridge and subjected to the same treatment and to similar loss. Their claim coming before the Attorney-General he held (10 Op., p. 21):

"So far as the papers show it is not denied by anybody that the facts proved make out a strong case against the Government for compensation for these losses, for it is evident that the order of General Johnston, and the military control established by him over this train, which we have seen

were the cause of its loss, were the wise and proper precautions of an officer to protect his own force and prevent his enemy from being strengthened."

In February, 1887, an act was passed authorizing the Secretary of the Treasury to pay the Porters a sum named "in full for all claims for damages or compensation for property impressed by order of Colonel Johnston in command of the United States troops en route for Utah in 1857." (24 Stat. at L., p. 900.)

During a previous session of the same Congress (24 Stat. at L., p. 128) was passed the act now under consideration, which referred to us plaintiffs' claim for property "taken and impressed into the service of the United States in the year 1857, by orders of Col. Albert Sidney Johnston, in command of the Utah expedition, as well as for property alleged to have been sold to the Government."

In view of all these authorities we conclude that the plaintiffs, under this special act, are entitled by virtue of its provisions to a judgment in their favor for the value of property lost through detention caused by imperious military necessity.

There remains to be considered one more point as to the special act. It refers to us the claim and "all papers relating thereto * * * for adjudication according to law, on the proofs heretofore presented, and such other proofs as may be adduced." The proofs referred to this court, which are understood to be all that were before the Congress, consist of affidavits and letters, some of which could under no theory of the law of evidence as administered in common law courts be admitted here (Brannen v. United States, 20 C. Cls., p. 219). To those the defendants object, and this objection is clearly good, unless the act intended to change the law of evidence in this case.

Unless this be the intention of the act, we fail to see how any force can be given to the words "for adjudication according to law on the proofs heretofore presented," and we have accordingly considered these proofs, attaching such weight to the statements of fact therein contained as in our judgment seemed proper, and disregarding all expressions of opinion, but admitting the proofs as competent evidence.

Judgment for plaintiffs in the sum of $44,025.00.

Judge NOTT did not sit in this case, and took no part in its decision.

Judge WELDON being ill did not sit in this case, and took no part in its decision.

16 V.—*Final judgment.*

At a Court of Claims held in the city of Washington, D. C., on the 27th day of February, A. D. 1888, judgment was ordered to be entered as follows:

The court, on due consideration of the premises, find for the claimants and do order, adjudge, and decree that the said Charles A. Perry, Elias H. Perry, and John D. Harper, of the firm of Charles A. Perry & Co., do have and recover of and from the United States the sum of forty-four thousand and twenty-five dollars ($44,025.00)

17 VI.—*Application of defendants for and allowance of appeal.*

From the judgment rendered in the above-entitled cause on the 27th day of February, 1888, in favor of claimants, the defendants, by their Attorney-General, on the 6th day of March, 1888, make application for, and give notice of, an appeal to the Supreme Court of the United States.

ROBERT A. HOWARD,
Assistant Attorney-General.

Filed March 6, 1888, in open court.

Allowed.

WILLIAM A. RICHARDSON,
Chief Justice.

18 In the Court of Claims.

VII.

CHARLES A. PERRY, ELIAS H. PERRY, AND John D. HARPER, of the firm of Charles A. Perry and Company,
vs
THE UNITED STATES. } No. 15313.

I, John Randolph, assistant clerk of the Court of Claims, do hereby certify that the foregoing are true transcripts of the pleadings in the above-entitled cause, of the findings of fact by the court, and the conclusion of law thereon, of the opinion of the court, of the final judgment of the court, of the application of the defendants for and the allowance of an appeal to the Supreme Court of the United States.

In testimony whereof I have hereunto set my hand and affixed the seal of said court at Washington, this eighth day of March, 1888.

[SEAL.]

JOHN RANDOLPH,
Assistant Clerk Court of Claims.

(Indorsement on cover:) No. 1385. The United States, appellant, *vs.* Charles A. Perry, Elias H. Perry, and John D. Harper, of the firm of Charles A. Perry & Company. Court of Claims. Filed March 9, 1888.

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Office Supreme Court U. S.
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JAMES H. MCKENNEY
CLERK

In the Supreme Court of the United States.

OCTOBER TERM, 1887.

THE UNITED STATES, APPELLANT,
v.
JOSEPH C. IRWIN AND JAMES T. Thornton, survivors of the firm of J. C. Irwin & Co. } No. 1384.

APPEAL FROM THE COURT OF CLAIMS.

BRIEF FOR THE UNITED STATES.

In the Supreme Court of the United States.

OCTOBER TERM, 1887.

THE UNITED STATES, APPELLANT,
v.
JOSEPH C. IRWIN AND JAMES T. Thornton, survivors of the firm of J. C. Irwin & Co. } No. 1384.

APPEAL FROM THE COURT OF CLAIMS.

BRIEF FOR THE UNITED STATES.

This case stands upon the same findings and the same judgment, except as to the amount, as the case of *The United States, appellant,* v. *Charles A. Perry & Co.*, No. 1385, of the present term of this court.

Appellant therefore respectfully asks that this case be considered with that, and that the brief filed therein be accepted by the court as the brief in this case.

Respectfully submitted.

A. H. GARLAND,
Attorney-General.
ROBERT A. HOWARD,
Assistant Attorney-General.

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FILED
JAMES H. MCKENNEY

In the Supreme Court of the United States

OCTOBER TERM, 1887.

THE UNITED STATES, APPELLANT,
v.
CHARLES A. PERRY, ELIAS H. PERRY, and JOHN D. HARPER, of the firm of Charles A. Perry & Co.
No. 1385.

BRIEF FOR THE UNITED STATES.

In the Supreme Court of the United States.

OCTOBER TERM, 1887.

THE UNITED STATES, APPELLANT,
v.
CHARLES A. PERRY, ELIAS H. PERRY, and JOHN D. HARPER, of the firm of Charles A. Perry & Co. } No. 1385.

BRIEF FOR THE UNITED STATES.

STATEMENT.

The appellees (claimants), partners, doing business at Salt Lake City, Utah, as Charles A. Perry & Co., about August 13, 1857, started three ox-trains from Fort Leavenworth, Kans., to Salt Lake City. At Rocky Ridge, early in October, they were met by United States troops, under command of Lieutenant-Colonel Smith, who ordered the trains to proceed no further without his permission. Before this they progressed successfully on their journey, making from eighteen to twenty miles a day, and their animals were in good condition.

A few days after this order of Colonel Smith, Colonel

Johnston, commanding the Army of Utah, issued the following letter of command:

HEADQUARTERS ARMY OF UTAH,
South Pass, October 19, 1857.

SIR: The Colonel commanding directs me to inform you, in reply to your letter of to-day, that no goods or supplies of any kind will be permitted to pass this army for Salt Lake City, or other points occupied by the Mormons, so long as they maintain a hostile attitude to the Government of the United States.

I am, sir, very respectfully, your obedient servant,

F. J. PORTER,
Assistant Adjutant-General.

In carrying out this order plaintiffs were kept with the Army; were required to have their teams yoked and ready by ten in the morning, and were kept often for two hours in consequence of delay in the general movement. The teams always got into camp late, and consequently were grazed at great disadvantage. They also were limited to a defined and contracted space assigned them, and were not permitted by the military authorities to go beyond this space. The animals belonging to the Army arrived first at camp and were posted on the best grass. As a necessary result, freighters' teams were insufficiently fed.

Plaintiffs' animals were often used to aid in hauling the Government trains, and thus did extra work on insufficient food. The orders requiring plaintiffs' trains to move with the Army column necessarily impeded their progress, and held them back until the bad weather set in.

For the reasons set forth in the preceding findings

plaintiffs' stock became greatly reduced in flesh, and many died from overwork and starvation.

Plaintiffs' trains were loaded with goods and merchandise notoriously intended for trade with the Morman inhabitants of the Territory of Utah, who were then in avowed rebellion and in threatened war with the Government of the United States, but plaintiffs were ignorant of this state of affairs upon starting and until arrival at Rocky Ridge.

R. H. and James Porter were also freighters, like plaintiffs; they also were detained at the same time under substantially the same circumstances as those hereinbefore set forth. An act for their relief is found in volume 24 of the Statutes at Large, at page 900.

These facts are taken from the findings of the court The court rendered judgment that claimants recover $44,020.

From this judgment the United States appealed.

ASSIGNMENT OF ERROR.

The court erred in entering judgment for claimants Charles A. Perry & Co.

BRIEF OF ARGUMENT.

Jurisdiction in this case was conferred by the following special act:

> An act referring to the Court of Claims the claims for property seized by General Johnston on the Utah expedition for examination and report.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the claims of Joseph C. Irwin & Co. and C. A. Perry & Co., freighters, for property claimed to have been taken and impressed into the service of the United States in the year eighteen hundred and fifty-seven, by orders of Colonel Albert Sidney Johnston, in command of the Utah expedition, as well as for property alleged to have been sold to the Government, be, and the same are hereby, referred, with all the papers relating thereto, to the Court of Claims for adjudication, according to law, on the proofs heretofore presented and such other proofs as may be adduced, and report the same to Congress.

Approved July 8, 1886.

The language of this act is peculiar. The act bears internal evidences that there were alterations and amendments made in some statute, draughted with the intention of conferring complete jurisdiction upon the Court of Claims. A presumption can not be tolerated that there is any carelessness in the terms and words of statutes for relief, of this character. If the legislature had meant to give authority to the claimant to proceed against the Government for a trespass, and to empower the court to hear and determine such an action, it would have so declared in this case, as it has declared in many others. But it has directly refused so to do.

First. The reference to the Court of Claims is of claims of C. A. Perry & Co., freighters, for property claimed to have been taken and impressed into the service of the United States, as well as for property alleged to have been

sold to the Government, for adjudication according to law. If this had been the end of the act, there would be no difficulty in interpreting its language. If the court had adjudicated *according to law* it could have rendered judgment for property sold to the Government, but it could not have entertained nor rendered judgment in a suit for damages for interference with claimant's business and for losses consequent upon said interference. According to law this court had jurisdiction *ex contractu* only.

For the value of property actually taken and used the Government might be held liable to answer upon an implied contract. But that is not this case. The definition of impressment by the Attorney-General (10 Op., 24) may be correct in relation to an equitable right for relief. But if it is an accepted term in the case at bar, it must be of narrower and more restricted meaning. It could only be applied to property actually seized and possessed or destroyed by the military officers. The cases of *Mitchell* v. *Harmony* (13 How., 134) and *United States* v. *Russell* (13 Wall., 623), make the proper distinctions. See also *United States* v. *Pacific Railroad* (120 U. S., 227).

Second. We submit that the intention of Congress *not* to authorize the Court of Claims to give judgment for damages arising from the injury to the freighters, other than from the direct and actual seizure and use and appropriation, is clear from the last words, "and report the same to Congress." This was, manifestly, an amendment. If, as is claimed, these words mean only that the judgment was in due course to be reported to Congress, as are other judgments, by the provisions of law (Rev. Stat., sec.

1057), why so solemnly add them to an already completed statute? The awkward grammatical connection of this clause with the other provisions shows that a peculiar significance and importance was attached to it. More than this, looking back to the title [which is material here, *United States* v. *Fisher*, 2 Cr., 386] we find the claims were referred *for examination and report.*

Now, taking all the parts together for the purpose of arriving at the legislative intention—the title (and this is part of the act for this purpose), the jurisdictional clause, and the direction to report to Congress—we see no difficulty. The *adjudication according to law* can be interpreted within a well defined jurisdiction of the Court of Claims. That court is directed, in certain matters and under certain circumstances, to investigate and determine facts and report the same to either house of Congress. Under the so-called *Bowman Act* (22 Stat. L., 485), this Perry claim could not have been entertained by the court on account of the operation of a statute of limitations. Congress therefore passed this special act and stated in the title that the claims were referred for examination and report, and in the body of the act the command that the court should report their action, *the same*, to Congress.

We hold, then, by fair interpretation, it was not intended the Court of Claims should render a formal judgment. The test prescribed in *Gordon* v. *United States* (117 U. S., 704) applies with full force.

> Indeed no principle of constitutional law has been more firmly established or constantly adhered to, than the one above stated—that is, that this court has no

jurisdiction in any case where it depends upon the legislature to carry its opinion into effect or not, at the pleasure of Congress.

Respectfully submitted.

A. H GARLAND,
Attorney-General.
ROBERT A. HOWARD,
Assistant Attorney-General.

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Office Supreme Court U. S.
FILED
MAR 31 1888
JAMES H. McKENNEY.

IN THE

Supreme Court of the United States.

October Term 1887.

No. 1384.

JOSEPH C. IRWIN & COMPANY

v.

THE UNITED STATES.

No. 1385.

CHARLES A. PERRY & COMPANY

v.

THE UNITED STATES.

As the appeal in this case depends on the construction of a special act of Congress, by which they were referred to the Court of Claims, and as some knowledge of the facts of the case which induced the legislation are material to a correct construction of the act, we have made a summary of them as they are shown by the findings and opinion of the Court of Claims.

In the autumn of 1857 General Albert Sidney Johnston was ordered with a large military force to Salt Lake City, and with him were traveling the newly-appointed Territorial Governor, Judge, and District Attorney.

In absolute ignorance of these facts three freighters had some time previously started with immense trains to carry merchandise to Salt Lake City from Atchison, Kansas, and from Fort Leavenworth, Kansas.

One of these, Joseph C. Irwin & Co., had fifty-one wag-

ons of his own, and also a chartered (or subcontractor's) train under his management and control belonging to J. & R. H. Porter, which fact cuts an important figure in this appeal, though the Porters are not claimants here.

Both of these trains were carrying merchandise of the usual kind for that market, as freight, for Livingston, Kincaid & Co., merchants in Salt Lake City.

The third train, which is the subject of the other suit, was owned by C. A. Perry & Co., merchants, of Kansas and Missouri, who were carrying merchandise of their own to Salt Lake City, to be sold there by themselves in the same manner as they had done in previous years.

The train of J. C. Irwin & Co. (with which was that of their subcontractor, J. & R. H. Porter) was in advance, and reached a point known as Rocky Ridge early in (8th or 9th of) October, 1857, making 18 to 20 miles, with the animals in good condition and the weather fine; and at this point Irwin halted, and picking out the jaded and foot-sore animals, some ten or a dozen, sent them over to Lander's Camp, where he went on a personal visit for two or three days, leaving his train in camp at Rocky Ridge. On his return he found his trains under the control of Lieut.-Col. Smith, of the Tenth U. S. Infantry, with orders to remain where they were until further orders. The train of C. A. Perry & Co., coming up in a day or two, was stopped in the same manner.

The distance from Atchison, Kansas, to Salt Lake City (and from Leavenworth is practically the same) is 1,200 miles. From Rocky Ridge to Salt Lake City is about 225 miles. From Camp Scott (Fort Bridger is practically the same) is about 112 miles.

These facts become material in construing the terms of the special act under which the claims of Irwin & Co., Petition No. 15215, and Perry & Co., Petition No. 15313, were referred to the Court of Claims.

That act is as follows:

"That the claims of Joseph C. Irwin & Co., and C. A. Perry & Co., freighters, for property claimed to have been taken and impressed into the service of the United States in the year 1857, by orders of Col. Albert Sidney Johnston, in command of the Utah expedition, as well as for property alleged to have been sold to the Government, be, and the same are hereby, referred, with all the papers relating thereto, to the Court of Claims *for adjudication according to law*, on the proofs heretofore presented and such other proofs as may be adduced, *and report the same to Congress.*"

The portion or terms as to which there seems to be a question as to the correct construction are in italics. Their construction has been carefully considered by the Court of Claims, and it is almost presumptuous that we should attempt to add anything to the lucid exposition presented in its opinion. Since, however, the soundness of that construction is impugned, we may be excused for suggesting a few thoughts bearing on the point.

And not only would we submit that the whole statute is to be read together, but that no part of it, and none of the language contained in it, is to be treated as meaningless.

We shall endeavor to show that the terms "*for adjudication according to law*," and the others, "and report the same to Congress," were used advisedly and are in nowise in conflict. In enacting this special act Congress knew the law; not only the law it had passed conferring jurisdiction on the Court of Claims, but the authoritative legal exposition thereof and construction placed upon them by the Courts.

But still more, in order to read the intention of Congress as expressed in this act we must understand that Congress knew the facts concerning which and the circumstances under which it was legislating. It is morally impossible to suppose that in the passage of the

Porter Act Congress had not in contemplation the Irwin and Perry Act it had just passed relating to exactly similar claims, which were not only contemporaneous in their origin but sprang from the identical transaction. Then, not only is the Irwin and Perry Act to be read in connection with the fact that during the same Congress there had been passed a special act for the relief of the Porters,* but the Irwin and Perry Act is to be read by

* The claim for the Porters was in the original bill. Why and how it came to be out of it as passed is best shown by the following extract from the *Record:*

JOHNSTON'S UTAH EXPEDITION.

[June, 1884, page 476, Vol. 15, p. 15, Forty-eighth Congress, First Session.]

The bill (S. 2166) referring to the Court of Claims the claims for property seized by General Johnston on the Utah expedition was considered as in Committee of the Whole.

The bill was reported to the Senate without amendment, ordered to be engrossed for a third reading, read the third time, and passed.

[Vol. 15, pt. 5, p. 5241, Forty-eighth Congress, First Session.]

Mr. PLUMB. On the 3d of June the Senate passed the bill (S. 2166) referring to the Court of Claims the claims for property seized by Gen. Johnson in the Utah expedition. I ask unanimous consent that the vote by which that bill was passed may be reconsidered.

The PRESIDING OFFICER. The bill is now in the House of Representatives.

Mr. PLUMB. I will accompany the motion by a resolution requesting the House to return the bill.

The PRESIDING OFFICER. The Senator from Kansas moves that the vote by which the bill referred to by him was passed be reconsidered, and that the House of Representatives be requested to return the bill to the Senate for future action. The question is on the motion to request the House to return the bill.

The motion was agreed to.

The PRESIDING OEEICER. The motion to reconsider will be entered and will be in order for action when the bill is received from the House of Representatives.

[Vol. 15, pt. 5, p. 5276; Forty-eighth Congress, First Session]

Mr. PLUMB. Yesterday, on my motion, the Senate asked the House to return the bill (S. 2166) referring to the Court of Claims the claims for property seized by General Johnston on the Utah expedition, which was passed by the Senate on the 3d of this month. I, at the same time, entered a motion to reconsider the vote by which the bill passed. I now ask unanimous consent that the vote by which the bill was passed be reconsidered.

The PRESIDENT *pro tempore.* The chair will, with the permission of the Senator, lay the bill before the Senate, when he can make his motion.

the light of the fact that there is a difference between the two acts, and the reason for that difference. This difference, and the reasons for this difference, combine to give us, if not a Congressional contemporaneous construction of this Irwin-Perry Act, then at least an explanation of the intention of Congress in framing its special provisions.

This is practically only an application of the sound maxim of the civil law, "*contemporania exposito est fortissima in lege.*" The Porters' claim had been *audited;* they had been paid $750, and Congress appropriated for their payment the exact amount as ascertained by the auditor, viz.: "The sum of ten thousand one hundred dollars, less

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The bill from the House of Representatives, with the message from the House, will be laid before the Senate.

The Chief Clerk read as follows:

"IN THE HOUSE OF REPRESENTATIVES, *June* 17, 1884.

"*Ordered*, That the clerk of the House be directed to return to the Senate, in pursuance of its request, the bill (S. 2166) referring to the Court of Claims the claims for property seized by General Johnston in the Utah expedition."

The PRESIDENT *pro tempore*. This bill passed the Senate on the third day of the present month. The Senator from Kansas now asks unanimous consent that the vote taken on the passage of the bill be reconsidered. Is there objection? The Chair hears no objection, and the vote is reconsidered. The question recurs, Shall the bill pass?

Mr. CAMERON, of Wisconsin. Without reconsidering the vote by which the bill was ordered to a third reading, I ask unanimous consent to offer an amendment.

The PRESIDENT *pro tempore*. The Senator from Wisconsin asks unanimous consent that the bill be amended as proposed by him. The amendment will be read for information.

The CHIEF CLERK. It is proposed to amend by striking out of lines 1 and 2 the words, "*Richard and James Porter.*"

Mr. CAMERON, of Wisconsin. I will state that the fact is that the claim of Richard and James Porter is pending in the Treasury Department, and is in a position now where the Treasury Department may pay the same. It will not, however, pay the claim while this bill affecting the claim is pending in either House of Congress.

Mr. MCPHERSON. May I inquire of the Senator from Wisconsin if the purpose of the amendment is to make the bill less?

Mr. CAMERON, of Wisconsin. Less.

Mr. COCKRELL. This takes one claim out of the bill.

The PRESIDENT *pro tempore*. The Senator from Wisconsin asks unanimous consent that the bill as engrossed be amended as has been read from the desk. Is there objection? The Chair hears none, and it is so amended. The question now is, Shall the bill pass? The bill was passed.

the sum of seven hundred and fifty dollars heretofore paid them, in full," &c.

"For adjudication according to law" can, amongst legislators and judges, have but one meaning, and that is to finally determine—to render a judgment final and absolute.

This indisputable meaning is wholly irreconcilable with the idea that an "adjudication according to law" is to be reported to Congress for further investigation and consideration, or any other action on the part of Congress than that to make an appropriation to pay the same.

The decision of this court in Gordon's case (Appendix to 117 U. S.) must have been known to Congress. It is legally presumed (conclusively) to have been known and that this act was passed in contemplation of it. Clearly under that decision there could be no "adjudication according to law" which was to be reported to Congress for any other purpose than appropriation.

Since then the express declaration of the intention and purpose of Congress in referring these cases to the Court of Claims is to be found in language which is unmistakable in terms and unambiguous in meaning, "for adjudication according to law;" language, the construction of which cannot be gratified if the construction is adopted that "report the same to Congress" means anything more than report for an appropriation. It may be well to see why these cases were to be reported to Congress at all, or why the words requiring such report are incorporated in the act.

The circumstances which induced the legislation explain fully.

This act was passed by the Forty-eighth Congress on July 8, 1886, and on February 18 following the same Congress appropriated for the payment of the claim of the Porters according to the ascertainment by the auditor.

The Irwin and Perry claims had not been audited; had not been so ascertained; were without homologation.

Congress could not advisedly appropriate money for their payment. The general question was clear enough to the Congressional mind, as shown by its action in the Porters' case. But how much?

Now, is it not as clear as a sunbeam, when we consider the two acts together, that Congress meant, "ascertain the amount judicially and report to Congress for an appropriation."

The liability of the Government is a historical fact read and known of all men. In the Porters' case we know the amount of that liability; in the other case the amount is unknown; therefore ascertain it judicially and report it to Congress for the only purpose for which it can be reported according to law—an appropriation.

"The intention of the lawmaker constitutes the law. A thing may be within the letter of a statute and not within its meaning, or within its meaning though not within its letter. In cases admitting a doubt the intention of the lawmaker is to be sought in the entire context of the section, statutes, or series of statutes in *pari materia*." (Atkins *v.* The Disintegrating Co., 18 Wall., 301.)

If we gather the intent of Congress in the meaning of the words used, "and report the same to Congress," from the surrounding facts, which were notorious as well as historical, and, from its subsequent action on the claim of the Porters, there can hardly be a doubt left that the purpose of Congress was that the final judgment of the Court of Claims was to be reported to Congress for an appropriation instead of an appeal being taken, as this construction fully gratifies the meaning of the words employed in the act in view of the then lately published opinion in Gordon's case, and this fully accords with the views ex-